

Montana Water Court
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FILED
01/09/2023
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
43B-0556-R-2021
Lambert, Kathryn
10.00

MONTANA WATER COURT, YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN
BASIN 43B
PRELIMINARY DECREE

* * * * *

CLAIMANTS: Maryann M. Lee; Paul J. Miller; James Roberts; Joni
Roberts; **Jeremy Mark Lee**

OBJECTOR: Paul J. Miller

CASE 43B-0556-R-2021
43B 20816-00
43B 30155790
43B 30155791

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must mail a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

Paul J. Miller objected to Paul J. Miller, Maryann M. Lee, James Roberts, and Joni Roberts irrigation claim 43B 20816-00. On May 2, 2022 Paul J. Miller filed an Unopposed Motion To Reinstate Flow Rate, Correct Point Of Diversion, Split Water Right, And Resolve

Objection with the supporting Affidavit Of Paul J. Miller providing historical information. This settlement documentation is viewable in the Court's FullCourt Enterprise case management system.

The point of diversion and means of diversion were not at issue, so the May 2, 2022 Unopposed Motion was deemed a motion to amend claim pursuant to section 85-2-233(6), MCA. On August 15, 2022 the Order For Publication Of Notice Of Motion To Amend Water Right Claim was issued. On September 20, 2022 Paul J. Miller filed the Notice Of Filing Affidavits Of Publication Of Notice To Water Users with attached copies of the newspaper notices. The newspaper notices state that the deadline for filing responses to the motion to amend was October 24, 2022. No responses were filed.

APPLICABLE LAW

The Montana Water Court has jurisdiction to review a motion to amend pursuant to section 85-2-233(6), MCA.

Rule 15 M.R.Civ.P. restricts the scope of the amendments to the conduct, transaction, or occurrence set forth in the original pleading or, in other words, the "same set of operative facts as contained in the original pleading." *Sooy v. Petrolane Steel Gas, Inc.*, 218 Mont. 418, 422-423 (1985). The requested amendment "merely makes more specific that which has already been alleged." *Prentice Lumber Company v. Hukill*, 161 Mont. 8, 15 (1972).

Notice must be published by newspaper if the requested amendments "may adversely affect other water rights." Section 85-2-233(6)(a)(i), MCA.

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect including claimants amending their own claims. Rule 19, W.R.Adj.R.

The Water Court may split a claim with multiple owners into separate claims upon request of all of the claimants prior to issuance of the final decree. Rule 26, W.R.Adj.R.

FINDINGS OF FACT

1. The Preliminary Decree states that the flow rate is 173.40 gpm. The Affidavit of Paul J. Miller states that the claimed flow rate of 250.00 gpm more accurately reflects the flow rate diverted prior to July 1, 1973. It is noted that 250.00 gpm is less than the flow rate specified in the Notice of Appropriation filed by Mr. Miller's parents for this right. The flow rate should be increased to 250.00 gpm before splitting the claim.

2. The changes requested in the motion to amend arise out of the same conduct, transaction, or occurrence specified on the original Statement of Claim, are based on the same operative facts specified in the Statement of Claim, and merely make more specific that which was already claimed on the original Statement of Claim.

3. The Preliminary Decree states that the point of diversion and means of diversion are:

<u>QTRSEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>	
NESWNW	5	9S	8E	PARK	PUMP

A second pump should be added to the point of diversion before splitting the claim:

<u>QTRSEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>	
NESWNW	5	9S	8E	PARK	PUMP
SENWNW	5	9S	8E	PARK	PUMP

4. The abstract of this claim also includes the following notice remark:

POINT OF DIVERSION WAS MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

This remark provides notice of this change made prior to issuance of the Preliminary Decree. The remark does not raise an unresolved issue which needs to be addressed. There are no proceedings required for this remark. The remark should be removed as having served its notice purpose.

5. The May 2, 2022 Unopposed Motion provides all the information needed to split the claim amongst the owners.

6. Claim 43B 20816-00 should be modified to represent only the Paul J. Miller portion of the claimed right. Claim 43B 30155790 should be generated for the James Roberts and Joni Roberts portion of the claimed right. Claim 43B 30155791 should be generated for

the Maryann M. Lee and Jeremy Mark Lee portion of the claimed right.

7. Claim 43B 20816-00 should be modified as follows: 1) the ownership should be modified by removing Maryann M. Lee, James Roberts, and Joni Roberts as co-owners; 2) the flow rate should be reduced from 250.00 gpm to 147.50 gpm; 3) the point of diversion and means of diversion should be the pump in the NESWNW of section 5, T9S, R8E, PARK; 4) the maximum acres should be reduced from 10.20 acres to 6.02 acres, and 5) the place of use should be:

<u>ACRES</u>	<u>QTRSEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
0.50	SENWNW	5	9S	8E	PARK
<u>5.52</u>	NESWNE	5	9S	8E	PARK
6.02					

8. The elements of claim 43B 30155790 should be same as 43B 20816-00 except: 1) the owners should be James Roberts and Joni Roberts; 2) the flow rate should be 22.50 gpm; 3) the point of diversion and means of diversion should be the pump in the SENWNW of section 5, T9S, R8E, PARK; 4) maximum acres should be 0.92 acres, and 5) the place of use should be 0.92 acres in the NESWNW of section 5, T9S, R8E, PARK.

9. The elements of claim 43B 30155791 should be same as 43B 20816-00 except: 1) the owners should be Maryann M. Lee and Jeremy Mark Lee; 2) the flow rate should be 80.00 gpm; 3) the point of diversion and means of diversion should be the pump in the SENWNW of section 5, T9S, R8E, PARK; 4) maximum acres should be 3.26 acres, and 5) the place of use should be 3.26 acres in the SENWNW of section 5, T9S, R8E, PARK.

CONCLUSIONS OF LAW

1. The notice requirements for a motion to amend claim specified in section 85-2-233(6), MCA, have been met.

2. The requested amendment “merely makes more specific that which has already been alleged.” *Prentice Lumber Company v. Hukill*, 161 Mont. 8, 15 (1972).

3. The settlement filed is sufficient to contradict and overcome the prima facie claim as it appeared in the Preliminary Decree and to split the claim.

RECOMMENDATIONS

Based upon the above, this Master recommends that the Court make the changes

specified in the Findings of Fact to correct the Preliminary Decree for this Basin and split the claim as requested. A Post Decree Abstract of Water Right Claim for each claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW

Service Via USPS Mail:

Maryann M. Lee
6633 SW Admiral Way
Seattle, WA 98116

James Roberts
Joni Roberts
535 US Hwy 89 S
Gardiner, MT 59030

**Jeremy Mark Lee
828 S Donovan
Seattle, WA 98108**

Service Via Email:

Michael J. L. Cusick
Jeremy A. Michael
Cusick, Farve, Mattick & Refling, P.C.
PO Box 1288
Bozeman, MT 59771-1288
(406) 587-5511
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office@cmrlawmt.com

Note: Caption and Service List Updated 12-21-22

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 20816-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: PAUL J MILLER
PO BOX 161925
BIG SKY, MT 59716 1925

Priority Date: MAY 21, 1970

Type of Historical Right: FILED

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER/FURROW

Flow Rate: 147.50 GPM

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 5 - LOW

Maximum Acres: 6.02

Source Name: YELLOWSTONE RIVER

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NESWNW	5	9S	8E	PARK

Period of Diversion: MAY 1 TO OCTOBER 31

Diversion Means: PUMP

Period of Use: MAY 1 TO OCTOBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	0.50		SENWNW	5	9S	8E	PARK
2	5.52		NESWNW	5	9S	8E	PARK
Total:	6.02						

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 30155790 STATEMENT OF CLAIM

Version: 1 -- ORIGINAL RIGHT

Status: ACTIVE

Owners: JONI ROBERTS
535 US HWY 89 S
GARDINER, MT 59030

JAMES ROBERTS
535 US HWY 89 S
GARDINER, MT 59030

Priority Date: MAY 21, 1970

Type of Historical Right: FILED

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER/FURROW

Flow Rate: 22.50 GPM

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 5 - LOW

Maximum Acres: 0.92

Source Name: YELLOWSTONE RIVER

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SENWNW	5	9S	8E	PARK

Period of Diversion: MAY 1 TO OCTOBER 31

Diversion Means: PUMP

Period of Use: MAY 1 TO OCTOBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	0.92		NESWNW	5	9S	8E	PARK

Total: 0.92

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 30155791 STATEMENT OF CLAIM

Version: 1 -- ORIGINAL RIGHT

Status: ACTIVE

Owners: MARYANN M LEE
6633 SW ADMIRAL WAY
SEATTLE, WA 98116

JEREMY MARK LEE
828 S DONOVAN
SEATTLE, WA 98108

Priority Date: MAY 21, 1970

Type of Historical Right: FILED

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER/FURROW

Flow Rate: 80.00 GPM

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 5 - LOW

Maximum Acres: 3.26

Source Name: YELLOWSTONE RIVER

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SENWNW	5	9S	8E	PARK

Period of Diversion: MAY 1 TO OCTOBER 31

Diversion Means: PUMP

Period of Use: MAY 1 TO OCTOBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	3.26		SENWNW	5	9S	8E	PARK

Total: 3.26